Filed 5/2/19 Byrne v. St. Margaret's Episcopal School CA4/3

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| DENISE BYRNE et al.,<br><br>Plaintiffs and Respondents,<br><br>v.<br><br>ST. MARGARET'S EPISCOPAL SCHOOL,<br><br>Defendant and Appellant. | G055990<br><br>(Super. Ct. No. 30-2017-00949941)<br><br>O P I N I O N |

Appeal from an order of the Superior Court of Orange County, Geoffrey T. Glass, Judge. Affirmed.

Gibson, Dunn & Crutcher, Michele L. Maryott, Blaine H. Evanson, Ashley N. Van Zelst and Amber D. McKonly for Defendant and Appellant.

Angelo & White, Joseph Angelo, J. Michael Echevarria and Kevin E. Lawless for Plaintiffs and Respondents.

* * *

H.B. and E.B., the children of plaintiffs Denise and Patrick Byrne (the Byrnes), attended St. Margaret's Episcopal School (St. Margaret's) until the spring of 2016. St. Margaret's contends that because an enrollment agreement for the fall of 2016 school year included an arbitration clause, the dispute that relates to events concerning H.B. in the spring of 2016 was also subject to arbitration. The trial court disagreed, and we conclude the court was correct. The order denying arbitration as to H.B. is affirmed.

## I

## FACTS

St. Margaret's is a private episcopal school, offering education from preschool to twelfth grade. H.B. was first enrolled at St. Margaret's in 2010, and E.B. enrolled a few years later.

Prior to the beginning of each school year, the Byrnes entered into written contracts with St. Margaret's. In January 2016, the Byrnes signed an agreement as to each child titled "2016-2017 Re-enrollment Contract" (the 2016 contract). The contract set forth the tuition and fees and payment due dates, included termination and cancellation clauses, and stated that both the parents and student must abide by school rules and regulations, among other things. It did not include an arbitration clause.

In February 2017, the Byrnes signed agreements for the 2017-2018 school year (the 2017 contract).[1] While substantially similar, this agreement included an arbitration clause: "Dispute Resolution: [¶] I agree that to the fullest extent allowed by law, any controversy, claim or dispute between our family and the School (and/or any of its employees, trustees, faculty, administration, volunteers, affiliates, or agents) relating to or arising out of this contract or in connection with any member of our family's

[1] Although school years overlap two separate years, for the sake of simplicity, we refer to September 2016 to June 2017 as the "2016 school year," and September 2017 to June 2018 as "the 2017 school year."

attendance at, relationship with, or use of the School ('Dispute'), will be submitted to final, confidential and binding arbitration administered by JAMS in Orange County, California . . . ."

In May 2017, H.B., who was in sixth grade at the time, was involved in an incident involving the possession of brownies alleged to contain marijuana on the St. Margaret's campus. Whether the brownies contained marijuana is disputed, but H.B. was immediately expelled. E.B. attended school through June 2017, but St. Margaret's canceled her enrollment for the 2017 school year. Accordingly, neither child attended school during the 2017 school year, which began in September 2017.

In October 2017, Denise and Patrick, on their own behalf and as guardian ad litem for the children, filed the instant lawsuit against St. Margaret's, alleging a cause of action for breach of the covenant of good faith and fair dealing as to each child's contract, and a cause of action for defamation as to H.B.

St. Margaret's moved to compel arbitration, arguing that the 2017 contracts included an arbitration clause, and therefore, the dispute, even though it arose during the 2016 school year, must be arbitrated. The Byrnes argued that the 2017 contracts did not go into effect until the 2017 school year, and because the children were expelled during the 2016 school year, no arbitration provision was in effect. After a hearing, the court denied the motion as to H.B., finding that his expulsion was during and related to the 2016 school year, and that the 2016 contract did not include an arbitration clause. "The court is not persuaded by the argument that the parties intended the arbitration clause to apply to the contract already in place. It relates only [to] controversies related to the 2017-2018 school year."

The court granted the motion as to E.B., finding that her enrollment was canceled for the 2017 school year, and therefore her cause of action was subject to the arbitration clause in the 2017 contract. (The Byrnes do not appeal that ruling.)
St. Margaret's now appeals the order denying their petition to arbitrate as to H.B.

II

DISCUSSION

*General Principles of Law and Standard of Review*

Code of Civil Procedure section 1281.2[2] requires a court to order arbitration "if it determines that an agreement to arbitrate . . . exists . . . ." California has a strong public policy in favor of arbitration as an expeditious and cost-effective way of resolving disputes. (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9.) Even so, parties can only be compelled to arbitrate when they have agreed to do so. (*Westra v. Marcus & Millichap Real Estate Investment Brokerage Co., Inc.* (2005) 129 Cal.App.4th 759, 763.) "The strong public policy in favor of arbitration does not extend to those who are not parties to an arbitration agreement, and a party cannot be compelled to arbitrate a dispute that he has not agreed to resolve by arbitration." (*Benasra v. Marciano* (2001) 92 Cal.App.4th 987, 990; see § 1281 [right to arbitration depends on contract].) "Arbitration . . . is a matter of consent, not coercion . . . ." (*Volt Info. Sciences v. Bd. of Trustees* (1989) 489 U.S. 468, 479.) The party seeking to compel arbitration, therefore, bears the burden of proving the existence of a valid arbitration agreement. (*Garrison v. Superior Court* (2005) 132 Cal.App.4th 253, 263.)

"[W]hen a petition to compel arbitration is filed and accompanied by prima facie evidence of a written agreement to arbitrate the controversy, the court itself must determine whether the agreement exists . . . . Because the existence of the agreement is a statutory prerequisite to granting the petition, the petitioner bears the burden of proving its existence by a preponderance of the evidence." (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413; see *Volt Info. Sciences v. Bd. of Trustees*, *supra*, 489 U.S. at pp. 475-476 [state contract formation law applies]; *Hotels Nevada v. L.A. Pacific Center, Inc.* (2006) 144 Cal.App.4th 754, 761-762 [enforceability

[2] All further undesignated statutory references are to the Code of Civil Procedure.

determined in manner provided by law for the hearing of motions].) "'Prima facie evidence is that degree of evidence which suffices for proof of a particular fact until contradicted and overcome, as it may be, by other evidence, direct or indirect.'" (*People v. Van Gorden* (1964) 226 Cal.App.2d 634, 636-637.)

"There is no uniform standard of review for evaluating an order denying a motion to compel arbitration. [Citation.] If the court's order is based on a decision of fact, then we adopt a substantial evidence standard. [Citations.] Alternatively, if the court's denial rests solely on a decision of law, then a de novo standard of review is employed." (*Robertson v. Health Net of California, Inc.* (2005) 132 Cal.App.4th 1419, 1425.)

St. Margaret's believes this case calls for de novo review, because "the facts relevant to arbitrability are undisputed and the trial court did not rely on conflicting extrinsic evidence regarding the document's meaning." But that only begs the question this case turned upon: which document? The trial court decided this case turned on the factual question of whether the 2016 or 2017 contract applied to H.B.'s expulsion during the 2016 school year. The Byrnes therefore appear to suggest (although they do not explicitly argue) that our review should be for substantial evidence. Ultimately, whether we review de novo or for substantial evidence does not matter. Our result is the same under either standard.

*No Agreement to Arbitrate*

At the end of the day, this is a very simple case. Although St. Margaret's seems to believe this case involves the applicability of the Federal Arbitration Act, the California Arbitration Act, and whether issues of arbitrability were effectively delegated to the arbitrator, all of this, as the Byrnes argue, is "putting the cart before the horse." Before we reach any of those issues, we must first decide whether any arbitration agreement at all applies to the dispute at issue.

The facts are simple. There are two contracts – one for the 2016 school year, and one for the 2017 school year. The 2016 contact does not mention arbitration; the 2017 contact includes a broad arbitration clause. H.B. was expelled during the 2016 school year. Which contract applies? We must conclude, as the trial court did, that the 2016 contract applies.

St. Margaret's first argues that the trial court erred as a gateway matter by deciding this issue. If the 2017 contract was valid, it claims, then because the issue of arbitrability was delegated to the arbitrator, the court should have "let the arbitrator decide whether the claims fall within the scope of the agreement." We disagree, and none of the case law St. Margaret's cites holds differently. The question here is not whether a particular dispute falls "within the scope of the agreement," but whether any agreement to arbitrate *exists at all*.

As to the 2016 school year, there was no such agreement, and this was an issue for the court to decide before granting the petition to compel arbitration. (*Garrison v. Superior Court*, *supra*, 132 Cal.App.4th at p. 263.) Many questions can be delegated to an arbitrator; whether an arbitration clause even exists is not one of them. To claim otherwise defies the precept that arbitration must be consented to by both parties. (*Benasra v. Marciano*, *supra*, 92 Cal.App.4th at p. 990.)

Reviewing the facts, it is undisputed that the 2016 contract included no arbitration agreement. It is also not contested that there is nothing in the 2017 contract making its arbitration clause retroactive, or that the arbitration provision was somehow incorporated into prior contracts. There is simply no support for this counterintuitive proposal.

Indeed, the contracts themselves define their temporal scope. The first provision in the 2016 contract states: "In consideration for the offer and acceptance of this Enrollment Contract (the "Contract") by St. Margaret's Episcopal School ("School"), I (we), the parent(s) or guardian(s) of the above-named student ("Student"), agree to

enroll the Student in the School for the 2016-2017 academic year based on the terms and conditions stated herein." The 2017 contract includes identical language "for the 2017-2018 academic year." St. Margaret's argues that multiple contracts exist coterminously unless expressly stated otherwise. But the language quoted above does state otherwise. Each contract stated the terms for the relevant academic year.

Our goal when construing a contract is to give effect to the parties' mutual intentions at the time of contract formation and to protect their reasonable expectations. (*ASP Properties Group, LP v. Fard, Inc.* (2015) 133 Cal.App.4th 1257, 1268-1269.) There was certainly nothing in either contract that would give the Byrnes the expectation that they would be restricted to arbitration if a dispute arose regarding the 2016 school year; Patrick Byrne's declaration states this explicitly.

There is no indication that St. Margaret's believed any differently. When it began the process of communicating with parents regarding the 2017 school year, it referred to "student re-enrollment," but included no mention that the 2017 contract was in any way retroactive. Had St. Margaret's actually intended the arbitration clause to be retroactive to the 2016 school year, it could have included language stating that it was.

St. Margaret's also argues that because some parts of the 2017 contract went into immediate effect, such as the responsibility to pay a deposit and the right to cancel, that the arbitration clause immediately became operative for all purposes, even if the dispute had nothing whatsoever to do with rights or responsibilities under the 2017 contract. It points to no cases where such an interpretation has been accepted by a court, however, and we do not find such an interpretation to be reasonable here, given the expectations of the parties and the express language of the contracts.

The bottom line is that there were two separate contracts. One applied to 2016, one applied to 2017. It is simply not reasonable for the Byrnes to expect that an arbitration provision in the 2017 contract would apply to a dispute that had nothing to do with that contract, but related entirely to H.B.'s alleged conduct during the 2016 school

year. Accordingly, based on simple principles of contract interpretation, we conclude the 2016 contract applied to the 2016 school year, and the 2017 contract applied to the 2017 school year. The trial court did not, therefore, err in concluding that no arbitration agreement existed between the parties when the dispute arose.

## III

## DISPOSITION

The order denying the petition to compel arbitration is affirmed as to H.B. The Byrnes are entitled to their costs on appeal.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

GOETHALS, J.